

1/4/07

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|-----------------------------|
| IN RE: | : | |
| | : | Case No. 01-88200 |
| HOSPITALITY VENTURES/LAVISTA, | : | |
| a Georgia General Partnership | : | Chapter 11 - Judge Bonapfel |
| | : | |
| Debtor. | : | |
| <hr/> | | |
| HOSPITALITY VENTURES/LAVISTA, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| vs. | : | Adversary No. 03-06596 |
| | : | |
| HEARTWOOD 11, L.L.C., VESTA HOLDINGS I, | : | |
| L.L.C., and VESTA HOLDINGS, INC., | : | |
| | : | |
| Defendants and | : | |
| Third-Party Plaintiffs, | : | |
| | : | |
| vs. | : | |
| | : | |
| DeKalb COUNTY, GEORGIA, and TOM | : | |
| SCOTT, in his official capacity as Tax | : | |
| Commissioner of DeKalb County, | : | |
| | : | |
| Third -Party Defendants. | : | |
| <hr/> | | |

ORDER VACATING JANUARY 10, 2006 ORDER;
OPINION ON MOTIONS FOR SUMMARY JUDGMENT
RELATING TO ISSUES IN THIRD-PARTY COMPLAINT; and
ORDER AND NOTICE OF TRIAL

On January 10, 2006, the Court entered its "Order on Issues in Third-Party Complaint" [116]. In the Order, entered as the Court's findings of fact and conclusions of law under FED. R. CIV. P. 52(a), *applicable under* FED. R. BANKR. P. 7052, the Court determined issues between Vesta Holdings I, LLC, as nominee for Heartwood 11, LLC (formerly known as

Heartwood 11, Inc.) (“Heartwood”) and DeKalb County,¹ based on facts as set forth in their motions for summary judgment that were undisputed and other facts determined at trial on October 27, 2005. Based thereon, the Order provided for the entry of final judgment in favor of Heartwood in the amount of \$59,853.07, which was duly entered [117]. The judgment was based on the Court’s determination that the hotel owned by the Debtor had a value in 1998 of \$2.5 million, as the Debtor and Heartwood had stipulated.

On DeKalb County’s timely appeal, the District Court vacated the judgment and remanded for a true factual finding with regard to the value of the hotel and for consideration of whether subject matter jurisdiction existed over the third-party complaint. In a separate Opinion, this Court has addressed the jurisdictional issue and stated its view that the District Court has subject matter jurisdiction over Heartwood’s third-party complaint under 28 U.S.C. § 1334(b), as supplemented by 28 U.S.C. § 1367, and that the third-party complaint is properly referable to this bankruptcy judge under 28 U.S.C. § 157(a) and LR 83.7, NDGa, to hear as a non-core proceeding under 28 U.S.C. § 157(c).

For reasons set forth below, and in accordance with the District Court’s remand order, the Court now vacates its January 10 Order, announces its Opinion that Heartwood’s Motion for Partial Summary Judgment [65] should be granted and DeKalb County’s Motion for Summary

¹The third-party complaint was filed and served against DeKalb County and Tom Scott, in his official capacity as Tax Commissioner of DeKalb County. The County parties identify themselves as the DeKalb County Board of Tax Assessors and the DeKalb County Commissioner. The nomenclature appears to be immaterial, as none of the parties have addressed the issue, and the Court, like the parties, will refer to the third-party defendant as DeKalb County.

Judgment [91] should be denied, and schedules a trial on the remaining issues,² which are the value of the hotel and the amount of tax based on that value.

VACATING OF JANUARY 10, 2006 ORDER

Because the dispute between Heartwood and DeKalb County is a non-core proceeding, the Court erred in entering the January 10, 2006, Order as findings of fact and conclusions of law under Rule 52(a) and in entering a final judgment based thereon. Although the District Court did not expressly vacate the Court's January 10, 2006, Order, the Court will now do so to correct this Court's error in entering findings of fact and conclusions of law contrary to the provisions of 28 U.S.C. § 157(c).

OPINION ON MOTIONS FOR SUMMARY JUDGMENT WITH REGARD TO THIRD-PARTY CLAIM

With the January 10, 2006 Order vacated, the cross-motions of Heartwood [65] and DeKalb County [91] for summary judgment remain pending. Heartwood's motion seeks partial summary judgment on the legal issue that, based on a theory of unjust enrichment, it is entitled to recover from DeKalb County the difference in what it paid for the tax claim and the amount allowed as determined pursuant to § 505(a). DeKalb County in its motion asserts that Heartwood is not entitled to recover against DeKalb County as a matter of law on several grounds. At the October 27 trial, DeKalb County raised other legal defenses.

Heartwood's motion for partial summary judgment should be granted, and DeKalb County's motion for summary judgment should be denied, because Heartwood is entitled to

²DeKalb County's Response to Heartwood's Motion for Summary Judgment, filed July 18, 2005 [78] states that DeKalb County does not contest Heartwood's statement of material facts.

recover from DeKalb County based on the principle of unjust enrichment and because none of DeKalb County's arguments provides a legal defense to Heartwood's claim. The reasons for this determination, previously set forth in the Court's January 10 Order, are set forth below.

Former § 505(a) of the Bankruptcy Code, as applicable in this proceeding prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, provides that the Bankruptcy Court "may determine the amount or legality of any tax . . . whether or not previously assessed." Invoking this statute, Hospitality Ventures/LaVista, the chapter 11 debtor, filed this adversary proceeding seeking a reduction of the claim for 1998 ad valorem taxes on its hotel³ that Vesta Holdings I, LLC, as nominee for Heartwood 11, LLC (formerly known as Heartwood 11, Inc.) ("Heartwood") acquired from DeKalb County in 1999 by paying the amount then due pursuant to now repealed O.C.G.A. § 48-3-19.⁴ Heartwood, in turn, filed

³As amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, section 505(a) no longer permits challenges to ad valorem taxes such as the Debtor's in this adversary proceeding. References herein are to the statute prior to its amendment.

⁴Former O.C.G.A. § 48-3-19(a)(1) provided in pertinent part:

Whenever any person other than the person against whom an execution has been issued pays an execution issued for state, county, or municipal taxes and proves compliance with subsection (b) of this Code section for individual transfers or subsection (c) of this Code section for transfers in lot blocks, the officer whose duty it is to enforce the execution, upon request of the party paying the execution, shall transfer the execution to the party so paying. The person to whom the execution is transferred shall have the same rights as to enforcing the execution and priority of payment as might have been exercised or claimed before the transfer, if, within 30 days of the transfer, the person to whom the execution is transferred has the execution entered on the general execution docket of the superior court of the county in which the execution was issued and, if the person against whom the execution was issued resides in a different county, has the execution entered on the general execution docket of the superior court in the county of such person's residence. In default of the required entry, the execution shall lose its lien upon any property which has been transferred in good faith and for a valuable consideration before the entry and without notice of the existence of the execution. The provisions of this paragraph with respect to enforcement rights of the transferee shall in no manner supersede the provisions of

a third-party complaint against DeKalb County, contending that the County should be required to pay Heartwood the amount of any reduction in the claim.

The Debtor and Heartwood agreed to a compromise that resolved issues as between them. This Opinion considers legal issues raised by the motions for summary judgment filed by Heartwood and DeKalb County.

I. BACKGROUND FACTS

DeKalb County assessed the value of the hotel as \$6,178,700 for purposes of 1998 ad valorem taxes, resulting in a tax obligation of \$ 93,075.92. Although the County made a similar assessment for 1997, assessments for prior and later years were substantially lower, \$2,135,600 for 1995 and 1996 and \$1,681,030 for 1999 through 2002.

The Debtor did not timely contest the 1998 assessment or pay the tax, and the County issued a tax fi. fa. for the tax of \$93,075.92, a penalty of \$4,653.80, and fi. fa. costs of \$20.50, a total of \$97,750.22. Under now repealed O.C.G.A. § 48-3-19, Heartwood purchased the tax fi. fa. on March 18, 1999 by paying the County \$100,549, the amount then due.

On December 3, 2001, the Debtor filed its chapter 11 petition. On November 12, 2003, the Debtor filed this adversary proceeding against Heartwood. [1]. Debtor's complaint asserts that its hotel should have been assessed with a value of \$1,466,897 for 1998 and its tax liability for that year reduced accordingly.

Heartwood filed its answer and third-party complaint against DeKalb County on December 11, 2003. [6, 7]. DeKalb County timely answered. [12].

subsection (e) of this Code section which limit the amounts which the transferee may charge for a release of the execution.

Heartwood and DeKalb County filed motions to abstain [13, 17], which the Court denied in an Order entered on August 18, 2004. [25]. After discovery, the parties filed motions for summary judgment.

II. MOTIONS FOR SUMMARY JUDGMENT AND CONTENTIONS OF THE PARTIES

In its motion [65], Heartwood sought summary judgment on the Debtor's claim on the ground that, because Heartwood had paid the taxes, the Debtor's request that the Court determine its proper tax liability constituted an action for a refund that § 505(a)(2)(B) bars in the absence of a timely request for a refund. Because the time to seek a refund under O.C.G.A. § 48-5-380 had expired, Heartwood asserted that the Court could not grant relief to the Debtor.

Alternatively, Heartwood's motion requested entry of partial summary judgment against DeKalb County if the Court determined that § 505(a) permitted reduction of the Debtor's tax liability. Heartwood argued that, under the theory of unjust enrichment, DeKalb County was liable to Heartwood for any difference between what Heartwood paid DeKalb County based on the original assessment and the amount of Debtor's tax liability as determined under § 505(a).

The Debtor responded to Heartwood's motion for summary judgment and filed its own motion. [68-74]. The Debtor contended that there was no dispute as to the value of the hotel in 1998 and that it was entitled to a reduction of its 1998 taxes as a matter of law under § 505(a), notwithstanding Heartwood's acquisition of the claim. The Debtor also moved to dismiss Heartwood's third-party complaint against DeKalb County. [72].

DeKalb County responded to Heartwood's motion for summary judgment [78] and filed its own motion for summary judgment. [91-93]. DeKalb County did not contest any factual issues but asserted a number of legal defenses: (1) that Heartwood was estopped from contesting

the amount of the tax because it had asserted in this proceeding that the original assessment was proper; (2) that DeKalb County was entitled to sovereign immunity as set forth in O.C.G.A. § 36-1-4, which provides, “A county is not liable to suit for any cause of action unless made so by statute;” (3) that Heartwood had purchased the tax fi. fa. without recourse under former O.C.G.A. § 48-3-19; and (4) that requiring DeKalb County to refund any money would amount to an indemnification in violation of Georgia’s constitutional prohibition on gratuities, GA. CONST. Art. III, § VI, ¶ vi.

III. RULINGS ON THE MOTIONS AND SCHEDULING FOR TRIAL

The Court heard oral argument on the motions at a hearing on September 20, 2005. The Court’s rulings on the motions, made on the record and set forth in an Order entered on October 13, 2005 [105] are summarized below.

The Court rejected Heartwood’s legal argument that, because Heartwood paid the tax, the Debtor’s action was for a refund of taxes already paid, a remedy that § 505(a)(2)(B) does not permit if the refund request is not timely made. The Court ruled that, although § 505(a)(2)(B) restricts an estate’s right to recover an overpayment of taxes, that restriction applies only if the *debtor* has paid the tax. Because the purpose of § 505(a) is to protect estates and creditors from the dissipation of an estate’s assets that could result if creditors were bound by a debtor’s improvident failure to contest a prepetition tax, it permits the bankruptcy court to determine the amount of a claim for taxes that the debtor has not paid even if the claim has been acquired by a third party. *See In re Piper Aircraft Corp.*, 171 B.R. 415, 418-19 (Bankr. S.D. Fla. 1994). Accordingly, the Court denied Heartwood’s motion for summary judgment against the Debtor.

The Court also ruled that there could be a genuine issue of fact with regard to the hotel’s

value in 1998 and that Heartwood and DeKalb County should be entitled to introduce evidence on this issue. Thus, the Court denied the Debtor's motion for summary judgment. Concluding that Heartwood's third-party complaint against DeKalb County was proper, the Court denied the Debtor's motion to dismiss it.

The Court deferred consideration of the cross-motions for summary judgment filed by Heartwood and DeKalb County with regard to whether Heartwood could recover from DeKalb County, pending determination of the value of the hotel at trial. The Court scheduled a trial on the complaint and the third-party complaint for October 27, 2005. [105].

Prior to the trial, the Debtor and Heartwood filed a motion to approve a compromise [106] in which they agreed, among other things, to stipulate that the fair market value of the hotel in 1998 for ad valorem tax purposes was \$2,500,000. As a result, they further stipulated, the proper amount of taxes, penalties, and interest due at the time Heartwood acquired the tax fi. fa. was \$40,695.93, consisting of principal of \$37,660, \$1,132.43 in accrued interest, \$1,883 in penalty, and \$20.50 for the fi. fa. fee. The Court scheduled a hearing on the motion to approve the compromise for the same time as the trial. [110].

IV. PROCEEDINGS AT TRIAL AND DETERMINATION OF FACTUAL ISSUES

At the call of the calendar on October 27, the Court first considered the motion to approve the compromise and stipulation and approved it. Written orders were entered on November 1 and 10. [112, 114]. DeKalb County did not oppose the compromise and stipulation or the entry of the Orders. Approval of the compromise resolved the issues in this adversary proceeding as between the Debtor and Heartwood.

The Court next heard argument from Heartwood and DeKalb County with regard to

Heartwood's claim against DeKalb County. Because the trial had been scheduled for the purpose of determining the value of the property in 1998 for ad valorem tax purposes, the Court provided DeKalb County the opportunity to present evidence on that issue. DeKalb County offered no evidence other than the assessment already in the record. Based on the record before the Court and the approved stipulation between the Debtor and Heartwood, the Court determined as a matter of fact that the value of the hotel for 1998 ad valorem tax purposes was \$2,500,000. As the District Court concluded, however, the stipulation as to value is not binding on DeKalb County. Consequently, the value of the hotel and the amount of tax due thereon are issues to be resolved at trial.

Based on a value of \$2,500,000, the Debtor and Heartwood stipulated that the Debtor's proper ad valorem tax liability for 1998 as of March 19, 1999, was a total of \$40,695.93, comprised of tax of \$37,660, penalties of \$1,883, fi. fa. fee of \$20.50, and interest of \$1,132.43. Based on that value (which DeKalb County will have the opportunity to contest at trial) and the calculations of the Debtor and Heartwood (which DeKalb County will also have the opportunity to contest), the Debtor's proper tax liability, determined in accordance with 11 U.S.C. § 505(a), as of March 19, 1999, is \$40,695.93.

Because Heartwood and the Debtor agreed to the foregoing, Heartwood is entitled to collect \$40,695.93 (plus interest from and after March 19, 1999) from the Debtor, and its claim is allowable for that amount. Heartwood paid DeKalb County \$100,549 for the tax fi. fa., being the amount due on March 19, 1999, based on the original assessment (\$93,075.92 tax, \$4,653.80 penalty, \$20.50 fi. fa. fee, and \$2,798.78 interest through March 18, 1999). Heartwood contends that it is entitled to recover the difference, \$59,853.07, from DeKalb County, on the theory of

unjust enrichment. Heartwood concedes that it is not entitled to interest from DeKalb County.

DeKalb County contends that Heartwood is not entitled to recover on the basis of the legal defenses asserted in its motion for summary judgment. In addition, at the October 27 trial and argument, DeKalb County asserted that Heartwood's claim is time-barred under O.C.G.A. § 9-3-26 because Heartwood did not make the claim within four years of its purchase of the tax fi. fa.

Except for the value of the hotel and determination of the proper tax liability based thereon, the facts material to a determination of the dispute between Heartwood and DeKalb County are undisputed. The Court thus turns to the questions of Georgia law raised by their motions for summary judgment.

V. PROPOSED CONCLUSIONS OF LAW WITH REGARD TO HEARTWOOD'S CLAIM AND DEFENSES OF DEKALB COUNTY

This section announces proposed conclusions of law with regard to the summary judgment motions of Heartwood and DeKalb County. The Court will submit them for de novo review by the District Court in connection with the submission of proposed findings of fact at the conclusion of the trial scheduled herein.

Heartwood purchased the tax fi. fa. from DeKalb County for \$100,549, the amount due as of March 19, 1999, based on DeKalb County's assessment of the Debtor's property with a value of \$6,178,700. As described above, the amount that is legally due and owing on this tax fi. fa. by operation of federal bankruptcy law (as between the Debtor and Heartwood) is \$40,695.93, plus interest from and after March 19, 1999, because the proper assessed value of the property was \$2,500,000. The legal issue is whether, if the value of the hotel is determined

to be less than the assessed amount and the proper tax due reduced accordingly, DeKalb County may retain the money paid by Heartwood that it could not have collected in the Debtor's bankruptcy case if Heartwood (or another third party) had not purchased the tax fi. fa.

DeKalb County observes that former O.C.G.A. § 48-3-19(a)(1), which authorized the purchase of the tax fi. fa., provided that, after the transfer of the fi. fa., the “transferee shall have the same rights as to enforcing the execution and priority of payment as might have been exercised or claimed before the transfer.” DeKalb County contends that, under this language, Heartwood stands in the legal shoes of DeKalb County and has no recourse against it.

Heartwood contends that it is entitled to recover based on the principle of unjust enrichment. “The theory of unjust enrichment applies when as a matter of fact there is no legal contract . . . , but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.” *Regional Pacesetters, Inc., v. Halpern Enterprises, Inc.*, 165 Ga. App. 777, 782, 300 S.E.2d 180, 185 (1983). “The unjust enrichment doctrine provides that a party shall not be allowed to profit or enrich itself inequitably at another’s expense.” *White v. Arthur Enterprises, Inc.*, 219 Ga. App. 124, 125, 464 S.E.2d 225, 225-26 (1996).

These principles apply here. If Heartwood had not purchased the taxes in 1999 and if DeKalb County had continued to hold the fi. fa., DeKalb County could not have collected more in the Debtor’s bankruptcy case than the \$40,695.93 that is lawfully payable if the property is worth only \$2,500,000. The Court sees no harm whatsoever to the legal interests of DeKalb County by requiring it to return what can only be described as a windfall if overvaluation occurred. Absent the filing of bankruptcy by the Debtor, DeKalb County as a matter of Georgia

law might well have been able to retain the windfall because the Debtor would have no remedy to correct any overassessment. But this does not mean that DeKalb County should be able to shift the risk of the taxpayer's bankruptcy and invocation of § 505(a) to correct any overvaluation to the third party that acquired the fi. fa. in good faith. Indeed, if there was an overvaluation, DeKalb County has benefitted in the meantime from the purchase because it has had the use of the overpayment, interest-free, since March 19, 1999. In short, if there was an overassessment, DeKalb County has received a benefit which, in equity, it ought to be required to return; it should not be allowed to profit inequitably at the expense of Heartwood.

DeKalb County insists that these principles are not applicable to Georgia counties. Georgia law, however, permits a purchaser of a tax fi. fa. under former O.C.G.A. § 48-3-19(a) to recover from a county the difference between the amount paid for the fi. fa. and the amount that the county itself could lawfully collect in the absence of the transfer. *See Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S.E. 149 (1908); *Eastern Air Lines, Inc. v. Fulton County*, 183 Ga. App. 891, 360 S.E.2d 425 (1987).

Heartwood's claim is not barred by the doctrine of sovereign immunity. Under O.C.G.A. § 36-1-4, "[a] county is not liable to suit for any cause of action unless made so by statute." DeKalb County contends that this statute and the doctrine of sovereign immunity preclude Heartwood's unjust enrichment claim. In *Eastern Air Lines, Inc., v. Fulton County*, 183 Ga. App. 891, 360 S.E.2d 425 (1987), however, the Georgia Court of Appeals ruled that a taxpayer could recover prejudgment interest and attorney's fees incurred in connection with a refund of wrongfully collected property taxes. In reaching this conclusion, the court noted that O.C.G.A. § 48-5-380, the statute governing the recovery of unlawfully collected municipal and county

taxes, “did not *create* the right to sue for such tax refunds but merely codified pre-existing common law authorizing such suits.” *Id.* at 892, 360 S.E.2d at 427. Under the principles enunciated in *Eastern Air Lines*, Heartwood’s claim for unjust enrichment resulting from the application of federal bankruptcy law to the determination of the Debtor’s tax liability is not barred by sovereign immunity.

Nor does requiring DeKalb County to return amounts it received in excess of what it lawfully could have collected in the Debtor’s bankruptcy case in the absence of Heartwood’s purchase of the tax fi. fa. violate the prohibition on gratuities set forth in Georgia’s constitution. GA. CONST. Art. III, § VI, ¶ vi (a) (“Except as otherwise provided in the Constitution, (1) the General Assembly shall not have the power to grant any donation or gratuity . . .”). In this regard, DeKalb County contends that the unjust enrichment remedy sought by Heartwood is a claim for indemnification that is a prohibited gratuity.

The argument fails because Heartwood’s claim is not for indemnification. Rather, it is a claim that arises (if the hotel was overvalued) from this Court’s determination that, as a matter of federal bankruptcy law, the Debtor did not owe the amount of taxes that DeKalb County had assessed in 1998. Under § 505(a), the Court determined that the Debtor’s liability for the 1998 taxes was \$59,853.07 less than DeKalb County originally assessed, and that Heartwood’s acquisition of DeKalb County’s original claim for those taxes did not preclude determination of the Debtor’s actual liability. Imposing the unjust enrichment remedy in favor of Heartwood does not require DeKalb County to incur any liability, or suffer any damage, beyond that it would have if it had never received any payment from Heartwood. There is no question that, if DeKalb County had not transferred the tax fi. fa. to Heartwood or another purchaser, and if the property’s

assessed value is determined to be \$2,500,000 or less, DeKalb County could not have collected more than \$40,695.93, plus interest. Putting DeKalb County in the position of receiving exactly the amount of taxes that it is entitled to receive under Georgia law, as affected by federal bankruptcy law, does not result in DeKalb County giving a gratuity to Heartwood in violation of the Georgia constitution.

DeKalb County also raises procedural defenses to application of the doctrine of unjust enrichment. In support of its motion for summary judgment, DeKalb County argued that Heartwood should be estopped because Heartwood defended the Debtor's § 505(a) claim by asserting that the original assessment of value was correct. Parties are entitled to plead alternatively, FED. R. BANKR. P. 7008(e)(2), and the doctrine of judicial estoppel applies only if the party to be estopped succeeded in asserting a prior inconsistent position. *E.g., New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001). Heartwood is not estopped from asserting its unjust enrichment claim because it eventually conceded that it could not establish, as a matter of fact, that the Debtor's hotel was worth more than \$2.5 million in 1998. Heartwood's unsuccessful pleading and introduction of evidence in a futile attempt to provide its position do not estop it from asserting its rights based on the facts as actually determined in this litigation.

Finally, DeKalb County at the October 27 hearing raised the defense that Heartwood's unjust enrichment claim was time-barred. In this regard, DeKalb County contends that Heartwood did not assert a claim for unjust enrichment until Heartwood filed its motion for summary judgment on June 7, 2005. Asserting that the claim arose when Heartwood purchased the fi. fa. in March 1999, DeKalb County asserts that the claim is time-barred because it was not

asserted within four years as required by O.C.G.A. § 9-3-26.⁵ The Court assumes, without deciding, that O.C.G.A. § 9-3-26 applies to a claim of unjust enrichment. Nevertheless, the statute does not bar the unjust enrichment claim because the claim did not arise until the Debtor filed this adversary proceeding on November 12, 2003, to challenge its actual tax liability under § 505(a). Until the Debtor raised the issue, Heartwood had no claim against DeKalb County based on unjust enrichment or any other theory. Because Heartwood asserted the claim within four years from the date on which it accrued, it is not time-barred.

VI. CONCLUSION

Under the provisions of former 11 U.S.C. § 505(a) applicable here, the Debtor's liability for 1998 DeKalb County ad valorem taxes is \$40,695.93, plus interest from and after March 19, 1999. DeKalb County is liable to Heartwood, based on principles of unjust enrichment, for the amount, if any, that Heartwood paid to DeKalb County in excess of the proper tax. The value of the hotel and the amount of tax due based on that value are disputed issues that will be determined based on the evidence presented at trial.

SCHEDULING OF TRIAL

For the foregoing reasons, the remaining issues to be determined are the value of the hotel and the proper amount of tax based on that value. The Court will, therefore, conduct a trial on these issues. At the conclusion of the trial, the Court will, in accordance with 28 U.S.C. § 157(c)

⁵O.C.G.A. § 9-3-26 provides:

All other actions upon contracts express or implied not otherwise provided for shall be brought within four years from the accrual of the right of action. However, this section shall not apply to actions for the breach of contracts for the sale of goods under Article 2 of Title 11.

and FED. R. BANKR. P. 9033, submit proposed findings of fact and conclusions of law to the District Court. In addition to dealing with the remaining issues to be determined, the proposed findings of fact and conclusions of law to be submitted will recommend that the District Court grant Heartwood's motion for partial summary judgment and deny DeKalb County's motion for summary judgment for the reasons set forth above.

ORDER

Based on, and in accordance with, the foregoing, it is hereby **ORDERED** as follows:

1. The Court's "Order on Issues in Third-Party Complaint," entered herein on January 10, 2006, is hereby **VACATED**.

2. Heartwood's motion for partial summary judgment should be granted, and DeKalb County's motion for summary judgment should be granted, based on the legal principles discussed in the Opinion set forth above. A trial is necessary on the valuation of the property in 1998 for purposes of ad valorem taxation and on any issues relating to the amount of tax to be imposed based on that valuation. Following the trial, the Court will submit proposed findings of fact and conclusions of law to the District Court, in accordance with 28 U.S.C. § 157(c) and FED. R. BANKR. P. 9033, with regard to issues heard at trial and with regard to the matters addressed in the Opinion set forth above. The Court does not intend that this Order and the Opinion with regard to the motions for summary judgment constitute the submission of proposed findings of fact or conclusions of law to the District Court for purposes of 28 U.S.C. § 157(c) or FED. R. BANKR. P. 9033(a).

3. **NOTICE IS HEREBY GIVEN**, that a trial in this proceeding will be held at 10:00 o'clock a.m. on February 15, 2007, 2007, in Courtroom 1401, U.S. Courthouse, Richard B. Russell Building, 75 Spring Street, S.W., Atlanta, GA.

IT IS SO ORDERED this 3 day of January, 2007

A handwritten signature in black ink, appearing to read "Paul W. Bonappfel", is written over a horizontal line.

PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE